ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION III

CA06-248

March 7, 2007

JUDY CAVIN, JONATHON CAVIN, and BRANDON CAVIN APPELLANTS	APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT, [P-04-266-6]
V.	HONORABLE MARK LINDSAY, JUDGE
BOYCE DAVIS APPELLEE	AFFIRMED

Ruby Fern Cavin, the testatrix in this case, died on May 15, 2004, at the age of ninety-six. Appellee, Boyce Davis, was nominated as executor under Ruby's 2003 will and petitioned for its probate. Appellants, Judy, Jonathon, and Brandon Cavin, challenged the probate of Ruby's 2003 will, under which none of them would have taken, and, instead, sought to have Ruby's 1999 will probated, under which Jonathon and Brandon would have inherited Ruby's fifty-seven-acre farm, and Judy would have served as executrix. The matter was heard by the trial court, which ruled that the 2003 will would be accepted for probate and that the petition to probate the 1999 will would be denied. James J. Polk, Ruby's nephew in California, was the sole beneficiary under the

2003 will. Appellants raise two points of appeal: (1) the trial judge erred in not fully considering appellants' evidence and argument that the testatrix acted under an insane delusion in disinheriting Brandon and Jonathon Cavin; (2) the trial court erred in finding that the appellants failed to establish that the testatrix suffered from the insane delusion that the appellants meant to cause her harm and dispossess her from her land. We affirm.

On appeal, probate cases are reviewed *de novo*; however, an appellate court will not reverse the trial court's findings unless they are clearly erroneous. *In re: Estate of Garrett*, 81 Ark. App. 212, 100 S.W.3d 72 (2003). A finding is clearly erroneous only when the reviewing court, in considering the entire record, is left with the definite conviction that a mistake was committed. *Turner v. Benson*, 59 Ark. App. 108, 953 S.W.2d 596 (1997). Due deference is given to the superior position of the trial court to determine the credibility of the witnesses and the weight to be accorded their testimony. *Garrett, supra*.

For their first point of appeal, appellants contend that the trial judge erred in "not fully considering [their] evidence and argument that the testatrix acted under an insane delusion in disinheriting Brandon and Jonathon Cavin." At trial, appellants contested the 2003 will, arguing that Ruby was generally mentally incompetent, that she acted under undue influence, and that she acted under an insane delusion. However, under this point of appeal, appellants challenge only the trial court's treatment of their theory that Ruby acted under an insane delusion. Specifically, they contend that "nothing in the trial court's opinion indicates that the judge ever squared up and addressed the evidence for

the insane delusion theory," and that "[s]ince the court also did not discuss the legal standard for a showing of insane delusion, one is left with the uncomfortable appearance that this important evidence and argument was not considered or weighed at all." As support for their position, appellants cite *Kirkpatrick v. Union Bank of Benton*, 269 Ark. 970, 601 S.W.2d 607 (Ark. App. 1980), which reversed and remanded for further consideration because the trial court did not fully consider appellant's argument that the purported will was the product of an insane delusion. We find no such basis for reversal or remand here.

Following the second day of testimony, the trial court prepared an eight-page letter opinion in which it recounted the background of the case, summarized the evidence that had been presented at the trial, and set forth its conclusions. In particular, the court referenced in its opinion that the appellants had argued that Ruby was operating under an insane delusion, and specifically concluded: "The Court finds that the Cavins have failed to prove by a preponderance of the evidence that Ms. Cavin lacked capacity, was under undue influence, duress or coercion, *or was suffering from an insane delusion*...." (Emphasis added.) Thus, the trial court acknowledged that the insane-delusion issue was before the court and specifically found that the appellants failed to prove by a preponderance of the evidence that Ruby was suffering from an insane delusion.

In addition, at the end of its letter opinion, the court directed appellee's counsel to prepare an order in accordance with the letter opinion, to incorporate the letter opinion by reference, to obtain approval as to form from appellants' counsel, and to submit the order

to the court for entry. The order was approved as to form by counsel, and it was entered August 31, 2005. Although appellants had submitted proposed findings of fact and conclusions of law at the hearing in this matter, there is nothing in the record indicating that appellants sought clarification or correction of the court's opinion by asking for specific findings of fact and conclusions of law pursuant to Rule 52 of the Arkansas Rules of Civil Procedure. Failure to do so constitutes a waiver of the issue. *Smith v. Quality Ford, Inc*., 324 Ark. 272, 920 S.W.2d 497 (1996); *Hickman v. Culberson*, 78 Ark. App. 96, 78 S.W.3d 738 (2002). We indulge in the presumption that the trial court acted properly and made the findings necessary to support its judgment. *Tillery v. Evans*, 67 Ark. App. 43, 991 S.W.2d 644 (1999); *Jocon, Inc. v. Hoover*, 61 Ark. App. 10, 964 S.W.2d 213 (1998).

For their second point of appeal, appellants contend that the trial court erred in finding that they failed to establish that the testatrix suffered from the insane delusion that the appellants meant to cause her harm and dispossess her from her land. We disagree.

In *Eddleman v. Estate of Farmer*, 294 Ark. 8, 10-11, 740 S.W.2d 141, 142 (1987), our supreme court explained the concept of an insane delusion:

> Where one conceives something extravagant, and believes it as a fact, when in reality it has no existence, but is purely a product of the imagination, and where such belief is so persistent and permanent that the one who entertains it cannot be convinced by any evidence or argument to the contrary, such a one is possessed of an insane delusion.
>
> However, as we pointed out in *Huffman v. Dawkins*, 273 Ark. 520, 526, 622 S.W.2d 159, 162 (1981), "[i]f there is any basis in fact of the delusion, or if it is

> not proved that the will was a product of the delusion, such a delusion will not warrant setting aside a legal document."

Moreover, in *Huffman*, cited in *Eddleman* above, our supreme court explained:

> The test is whether there was any basis for Mr. Hawkins' beliefs. It is the burden of one proposing to set aside a will because of an insane delusion to prove it by a preponderance of the evidence. The judge found the evidence short in this regard and we cannot overrule that finding. The testimony of Hawkins' doctor and an expert clinical psychologist was in conflict. The clinical psychologist, assuming certain facts, testified that Hawfins did suffer from the two insane delusions. It was the role of the probate court to resolve the conflicts. Having found the cross-appellants failed to meet their burden of proof, we cannot clearly say the probate court was wrong.

Huffman v. Dawkins, 273 Ark. 520, 526, 622 S.W.2d 159, 162 (1981) (citations omitted). Earlier, in *Taylor v. McClintock*, 87 Ark. 243, 112 S.W. 405 (1908), a case appellants rely upon heavily, our supreme court explained that the burden of proof is on the one who attacks a will on the ground of insanity; and if the testatrix's general capacity is conceded, the proof is more difficult, and in such cases the proof of paranoia must be of the clearest and most satisfactory kind.

The trial court concluded that Ruby's general mental capacity at the time she executed her 2003 will was established by the evidence, and appellants do not challenge that finding in this appeal. Thus, appellants' burden of proof at trial was rendered even more difficult because when the testatrix's general capacity is established, the proof of "partial insanity" must be of the clearest and most satisfactory kind. *See Taylor, supra.* Moreover, if there is any basis in fact for the delusion, it will not warrant setting aside a

legal document, *Eddleman, supra,* and it is the role of the fact finder to resolve conflicts, *Huffman, supra*.

Appellants recount the testimony that they contend supports their position that Ruby suffered from an insane delusion. A representative sampling of that testimony is that Ruby told her nephew, James Polk, that Judy was surreptitiously trying to take control of her property, forging checks, and taking money from her account; that appellants could not wait for her to die; that she was afraid appellants would kill her and that she lived in fear of them; that appellants were "hell bent" on getting her property; that Judy had tricked her into signing the deed to the farm, camouflaging it as a medical authorization; and that Judy had told her the farm belonged to Judy, Ruby should leave, and appellants were going to put her in a nursing home.

Appellants reason that by such evidence they established that Ruby held a persistent insane delusion that appellants intended to harm her and take her property; that appellee failed to demonstrate any factual basis for the testatrix's belief that appellants intended to harm her and take her property; and that the disinheritance of Brandon Cavin and Jonathon Cavin from Ruby Cavin's 2003 will was the product of her insane delusion. Though appellants acknowledge that any evidence of a factual basis for the testatrix's belief would take it out of the realm of insane delusion, they contend that "there is simply no such evidence here." We disagree.

Appellants Jonathon and Brandon Cavin are the sons of James Cavin, who was Ruby's husband's nephew. James Cavin is not a party in this matter. Jonathon and

Brandon's mother, appellant Judy Cavin, is James's wife. Jonathon and Brandon would have each received approximately one-half of the farm under Ruby's 1999 will. Judy would have served as executrix of that will. In August 2000, while Ruby was in a nursing home recuperating from a broken hip, she executed a deed that conveyed the property to Judy Cavin. According to Judy, she had the deed prepared at Ruby's request because Ruby wanted to save on the cost of probate and because Ruby told her, "You know I want those boys to have that." Judy explained, however, that she never regarded the place as hers, that she considered it to still be Ruby's, that Ruby considered it to be Ruby's, and that they both understood the situation. Judy acknowledged that Ruby filed a lawsuit to get the conveyance set aside. She stated that the lawsuit was eventually settled and that she and James decided to sign the deed back to Ruby because "we just didn't want to see her upset."

In addition, Judy testified that she never brought up sending Ruby to a nursing home, but that Ruby would state that she probably needed to go. Judy explained that she accompanied Ruby on her visits to see Dr. Santos because Ruby wanted her to go along and explain what the doctor was saying. She said that the last time she accompanied Ruby on such a visit was in mid to early 2003. She said that she explained to Ruby that Dr. Santos felt it would be in her best interest to go to a nursing home. Judy testified that Ruby told her she did not want to go to a nursing home, and that Judy told Ruby it was Ruby's decision.

Judy acknowledged that in the lawsuit Ruby filed against Judy and James, Ruby claimed to have loaned money to James. Judy explained that "what happened was she had given us a gift of $10,000 over an estate [where James's uncle] had left his personal property to [James and] somehow or other, the way that was set up, we had to pay all the attorney fees." Judy testified that Ruby found out they "were going to have to pay all those attorney fees and that's when she gave us the gift to pay those fees." She stated that the "other transaction was for a vehicle that was purchased" for $5,000 out of the aforementioned estate. Judy described both transactions as gifts, not loans. She also explained that in early 2001 Ruby "transferred all of her bank accounts just into my name." She stated that Ruby wanted her name put back on the account and that she told Ruby, "Well, it's your money. We'll do whatever you want to do." She testified that she "never took money from those accounts wrongfully. I never took any money from those accounts at all." Judy explained that she thought Ruby drew up a power of attorney in Judy's name at the same time she drew up the 1999 will, but that she never used it to take funds from Ruby or for any other purpose.

At trial, appellee offered testimony to refute the theory that the testatrix suffered from an insane delusion. Anna Simmons, a friend and neighbor of Ruby's, testified that Ruby told her that Judy had gotten everything, including Ruby's checking account and home, put in Judy's name when Ruby was in the nursing home after she broke her hip. Simmons testified that Ruby was very upset about it; that she even cried; that Ruby told her she did not go see a lawyer for a long time because Judy kept telling her that she

would and that Judy kept making excuses; that Ruby decided that Judy did not intend to give back the property; and that was when Ruby went to get her own lawyer.

Appellee, Boyce Davis, who was Ruby's attorney, testified that he first met with Ruby in early June 2003, at which time she told him she believed she had somehow signed her home and farm over to Judy Cavin three years earlier. He recounted that she told him Judy had asked her two or three times why she did not just move off and let the boys take over. Davis said that he asked Ruby if she remembered ever signing a deed, and that Ruby told him, "No, but I remember she brought something for me to sign and I wasn't sure what it was, but I went ahead and signed it anyway." He said that she told him she was in a nursing facility at that time and that she was under medication, which he said he later confirmed. He said that as a result of his meeting with Ruby and his later examination of her medical records, he filed suit on her behalf against Judy and James Cavin to have the conveyance set aside. Davis testified that the deed was Ruby's main concern, but that she told him later on that she had loaned James Cavin $10,000 and then later loaned him another $5,000. Davis stated that he amended the complaint to reflect those additional allegations. He said that Ruby also told him during the period of the litigation that James Cavin had put a water connection on the property without first telling her. Davis stated that the matter was eventually resolved months later, with Judy and James providing a quitclaim deed of the property to Ruby, and Ruby nonsuiting the case and paying $1500 toward Judy's attorney's fees. He said that Ruby met with him several

times during the course of that litigation, and, that as a result of some of those discussions, he drafted the 2003 will.

There was clearly conflicting evidence presented in this case, and it was the trial court's role to resolve those conflicts. Our review of the record does not leave us with a definite and firm conviction that a mistake was made in this case.

Affirmed.

ROBBINS and MILLER, JJ., agree.